APPEAL NO. 050614
FILED MAY 5, 2005

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing (CCH) was held on January 27, 2005. The hearing officer determined that the respondent's (claimant) impairment rating (IR) is 45%; that the compensable injury of _____, does not extend to or include either a brachial plexus injury or a nerve root injury; and that the appellant (self-insured) did not waive the right to contest the compensability of the diagnosis of brachial plexus injury or nerve root injury by failing to timely contest the injury in accordance with Section 409.021. The issues of extent of the injury and the self-insured waiver have not been appealed and have become final pursuant to Section 410.169.

The self-insured appeals the 45% IR, contending that the designated doctor rated portions of the injury which had been found to be noncompensable; that the designated doctor did "not use the [Diagnosis-Related Estimate (DRE)] categories" of the Guides to the Evaluation of Permanent Impairment, fourth edition (1st, 2nd, 3rd, or 4th printing, including corrections and changes as issued by the American Medical Association prior to May 16, 2000); and that the designated doctor rated neurological defects based entirely on the claimant's history. The self-insured urges that the 5% IR of a required medical examination (RME) doctor be adopted. The claimant responded, contending that the designated doctor's report was not contrary to the great weight of other medical evidence and that the self-insured should not be allowed to raise "various legal arguments for the first time in its appeal." The claimant urges affirmance of the 45% IR.

DECISION

Reversed and remanded.

The parties stipulated that the claimant sustained a compensable injury on _____, and that the claimant reached maximum medical improvement (MMI) on July 21, 2004. The evidence indicates that the claimant had been a "security monitor" at one of the self-insured's facilities and had sustained the compensable injury breaking up a fight on _____. The claimant testified that one of the boys in the fight had hit him on the right side of his face and neck and that he sustained injuries to his right jaw, right ear, right side of his face and neck and right shoulder. The claimant began treatment with Dr. P on October 9, 2002. Dr. P's notes indicate complaints of headaches and cervical pain. A neurological consult was recommended on October 14, 2002, but was not performed at that time. Dr. P certified the claimant at MMI on December 10, 2002, with a 0% IR and in a report dated December 13, 2002, stated that the claimant "presented for follow up on December 10, 2002, with relief of all his symptoms." The claimant was released to return to work without restrictions on December 11, 2002. The claimant testified at the CCH, that he was still having pain

and that he did not believe he could return to work but that Dr. P told him to "give it a try."

Apparently something happened on (subsequent date of injury), while the claimant was opening or lifting a chain door. The claimant was subsequently diagnosed with a possible rotator cuff tear and/or a C3-4 disk herniation or bone spur. The claimant had right shoulder surgery and rotator cuff repair on December 10, 2003. That surgery was apparently unsuccessful and the claimant was subsequently diagnosed with "right shoulder adhesive capsulitis" or frozen shoulder. The claimant claimed a "recurrent" injury to his neck and a new injury to his right shoulder. In another CCH on June 24, 2004, another hearing officer determined that the _____, compensable injury (which is the subject of the current case) does not extend to include disc protrusions at C3-4, that the claimant had certain periods of disability due to the _____, injury, and that the claimant "did not sustain a compensable injury on (subsequent date of injury)." These determinations were not appealed and have since become final pursuant to Section 410.169.

A referral doctor in a consultation of May 12, 2003, noted a normal neurological exam of the upper extremities. (Dr. F) the self-insured's RME doctor in a report of July 17, 2003, noted confusion of the records of the _____, injury and the (subsequent date of injury), event. Dr. F concluded:

> I am unable to separate injuries of _____ and (subsequent date of injury), but it probably does not matter since there is no evidence of injury from either date. It is the opinion of this examiner that he had preexisting significant degenerative disease in keeping with his stated age of 59 and is indicated by his attending physician, [Dr. P], he did reach [MMI] on December 10, 2002, and had 0% impairment.

The claimant had right shoulder surgery which resulted in the frozen shoulder on December 10, 2003. Subsequently, (Dr. B) was appointed as the designated doctor. In a report dated January 9, 2004, Dr. B stated that the claimant was not at MMI. (Dr. M) was appointed as a Texas Workers' Compensation Commission (Commission) RME doctor and in a report dated March 30, 2004, stated that he did not know what the diagnosis was but that he thought "this second injury [the (subsequent date of injury), event] just aggravated symptoms he already had from the first one." Dr. M noted the MRI was unremarkable, and his concern "about the possibility of RSD." The other hearing officer in the June 2004 CCH references Dr. M's report and states it "is not very helpful." Dr. B, in an undated letter received by the Commission on April 29, 2004, suggests a "TMJ" injury, notes the right shoulder "is not a compensable injury," states the claimant "should have an EMG of both upper extremities" and states that the claimant is still not at MMI.

The designated doctor in a Report of Medical Evaluation (TWCC-69) and a report dated July 21, 2004, certified MMI on that date with a 45% IR. Dr. B noted the claimant's "frozen" right shoulder and based the IR on "a significant neurological deficit

in the right upper extremity, which is not related to his right shoulder injury" referencing Tables 11, 12, and 14 (Sensory or Motor Deficits of Brachial Plexus) affecting the upper trunk and mid trunk. Dr. B gives a diagnosis of "Brachial Plexus injury right upper extremity" and combines certain sensory and motor deficits to arrive at the 45% IR. The self-insured contends that the designated doctor did not even examine the claimant based on a comment on page 5 of Dr. B's report regarding neurological testing of the right upper extremity as "unable to perform."

(Dr. O) in a peer review report dated August 31, 2004, disagreed with the designated doctor and opined that the claimant's IR should be 5% based on a DRE Cervicothoracic Category II: Minor Impairment. Dr. B, the designated doctor, was apparently told that the brachial plexus injury was not compensable because Dr. B in a letter dated October 4, 2004, stated "I understand that Brachial Plexus injury is not compensable." Dr. B then reissued his July 21, 2004, report, verbatium, except on page 8 of the report "brachial plexus injury" is whited out and "nerve root injury" is written in. (We note however, that Dr. B did not even bother to white out the diagnosis of "Brachial Plexus injury right upper extremity" on page 3 and the reference to "the brachial plexus injury" on page 9 of the report.) (Dr. W), the treating doctor, in a one sentence note dated October 1, 2004, agrees with Dr. B's "findings as being related to the _____ injury." Dr. F, the self-insured's RME, after another examination, in a report dated October 28, 2004, stated he could not relate "a rotator cuff tear to his alleged assault" (the compensable injury) and concurred in Dr. O's 5% IR based on DRE Cervicothoracic Category II. This report from Dr. F does not contain an MMI certification and we would note as of October 28, 2004, the only MMI date in evidence is Dr. B's July 21, 2004, certification.

As noted at the onset, the hearing officer, in an unappealed finding and conclusion, determined that the compensable injury does not extend to or include either a brachial plexus injury or a nerve root injury. The hearing officer further notes that "there is much in [Dr. B's] reports to trigger questions about his rating," giving examples, and that Dr. B's rating "seems questionable on its face" but concludes that "all of the perceived imperfections . . . would appear to fall within the realm of opinion and discretion." We disagree.

One of the problems with this case is that the compensable injury has not been defined. Between the June 2004 CCH and this CCH certain matters have been determined not to be compensable but there has not been either agreement or determination as to what the compensable injury is. Depending on what the compensable injury is will determine whether the DREs should be used. We reject the claimant's assertion that this was a matter first raised on appeal (and even if it had been, it would not be improper or constitute reversible error) as the self-insured referred to it in closing argument and the hearing officer referenced whether a "specific diagnosis" impairment should be used in his decision.

Dr. B was advised that brachial plexus was not part of the compensable injury and in response to that information Dr. B, in an amended report, simply whited out one

reference to brachial plexus and substituted nerve root injury without further explanation or change in his report. The Appeals Panel has held that when a designated doctor refuses to comply with the Commission direction regarding what is or is not included in a compensable injury, one of the remedies is to appoint another designated doctor. Texas Workers' Compensation Commission Appeal No. 982402, decided November 23, 1998. Section 408.125(c) provides that the report of the designated doctor shall have presumptive weight, and the Commission shall base the IR on that report unless the great weight of the other medical evidence is to the contrary, and that if the great weight of the medical evidence contradicts the IR contained in the report of the designated doctor chosen by the Commission, the Commission shall adopt the IR of one of the other doctors. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.6(i) (Rule 130.6(i)) provides that the designated doctor's response to a Commission request for clarification is considered to have presumptive weight as it is part of the designated doctor's opinion. In this case the self-insured urges that the great weight of other medical evidence is contrary to the report of the designated doctor and that we should adopt the 5% IR in Dr. F's October 28, 2004. As previously noted, that IR does not certify a date of MMI (although subsequently there was a stipulated MMI date). Rule 130.1(b)(2) states that MMI must be certified before an IR is assigned. *See also* Texas Workers' Compensation Commission Appeal No. 010393, decided March 29, 2001. We hold that Dr. F's 5% IR cannot be adopted because it does not contain an MMI date and it is not known whether the 5% IR was related to the designated doctor's July 21, 2004, MMI date or whether the whole compensable injury was rated. There is no other doctor's IR that can be adopted.

We reverse the hearing officer's decision that the claimant's IR is 45% as assessed by the designated doctor because the designated doctor continued to assess his IR on a diagnosis which the Commission has found not to be part of the compensable injury and the designated doctor has demonstrated that he will merely change the diagnosis without reconsidering the Commission's determination on the extent of the injury. We remand the case back to the hearing officer. The hearing officer is to first define what the compensable injury is, considering the unappealed June 2004 CCH decision and the unappealed determinations in this decision. After the compensable injury is defined a second designated doctor is to be appointed. The designated doctor is to be given all the medical records and is to be advised, what the compensable injury is, that the MMI date is July 21, 2004, and then is to be directed to assess an IR as of the MMI date. *See* Rule 130.1(c)(3). The parties are to be allowed to comment what they believe the compensable injury is and subsequently be allowed to comment on the second designated doctor's report. The hearing officer is then to make a determination on the IR.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Commission's Division of Hearings, pursuant to Section 410.202 which was amended June 17, 2001, to exclude Saturdays and Sundays and

holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

The true corporate name of the insurance carrier is **(a self-insured governmental entity)** and the name and address of its registered agent for service of process is

(NAME)
(ADDRESS)
(CITY), TEXAS (ZIP CODE).

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Robert W. Potts
Appeals Judge

_____
Margaret L. Turner
Appeals Judge